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## Residential Landlord-Tenant Law in Montana: A Landlord Perspective

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# ARTICLE

## RESIDENTIAL LANDLORD-TENANT LAW IN MONTANA: A LANDLORD PERSPECTIVE

**Robert W. Minto, Jr.\***

Landlord-tenant relations touch each of us in our daily lives; some may be landlords, some tenants, and most of us transact business or visit friends and acquaintances in rented premises. Traditionally the laws governing landlord-tenant relations find their roots in the common law of England and the decisions of our own courts, with little, if any, statutory particularity. Recent legislative enactments in the area of residential landlord-tenant relations constitute a major departure from the past, both in legal substance and form. This article intends to provide the practitioner with an insight into the changes, how clients can best deal with them, and the attorney's role in the prevention and correction of residential landlord and tenant disputes.

### I. RECENT LEGISLATIVE ENACTMENTS

Since 1895, with the original enactment of the statutes embodied in Title 42, there has been little differentiation between residential and non-residential landlord-tenant relations. To a great extent landlords and tenants have been left to fend for themselves, both in the creation of their relationship and the resolution of their disputes. Because of the minor magnitude of these disputes, there are few published decisions to provide precedent, and the justice courts have rightly shouldered the greatest share of the burden in landlord and tenant disputes. The decisions, having little statutory basis, were based on the principals of equity and fairness.

Rising costs, along with the increase in number of available rentals for residential use and the failure of our old laws to reflect the modern realities of the landlord-tenant relations have made apparent the need for specific legislation to provide consistency in landlord-tenant relations and more uniform disposition of disputes. The Montana legislature in recent legislative sessions passed the

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"Tenants' Security Deposit Act" (1974)<sup>1</sup> and the "Montana Residential Landlord and Tenant Act of 1977."<sup>2</sup> Both have had an extraordinary impact on the industry. Landlords, who for years maintained little or no documentation in their relationships with their tenants, find themselves unable to obtain redress for damages caused by tenants. Tenants, who for years maintained friendly relationships with their landlords and dealt with them on only a verbal basis find themselves inundated with notices, present condition statements, and forms required by the landlord in order for a tenant to request repairs to the premises. This result, while on its face harsh and impersonal, is necessary and predictable if the legislative intent is to be carried out.

Both Acts contain provisions, which I find severe, inflexible or punitive. I am not so naive as to think that our legislature, or any legislature, is capable of enacting laws immune to criticism or easily manageable in their original form. Montana's legislature appears to be taking a position that the laws must be made flexible to make them workable and usable by the public. This intent is apparent by its willingness to amend the Tenant's Security Deposit Act only two years after its initial passage, to remove some restrictive and unnecessary provisions.<sup>3</sup>

## II. TENANTS' SECURITY DEPOSIT ACT

"An act establishing the rights and obligations of Landlords and Tenants in Security Deposit," as amended by the 1977 Legislature, is the official title of the act which revolutionized the concept of security deposits in Montana.<sup>4</sup>

"Security deposit" means value given in money or its equivalent to secure the payment of rent by the tenant under a leasehold agreement or to secure payment for damage to and cleaning of the leasehold premises. If a leasehold agreement or an agreement incident thereto requires the tenant or prospective tenant to provide or maintain in effect any deposit to the landlord for part or all of the term of the leasehold agreement, the deposit shall be presumed to be a security deposit.<sup>5</sup>

As originally enacted, cleaning expenses were not included by specific reference, and the landlord was only authorized to deduct from the deposit an amount "equal to the damage alleged to have

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1. REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], §§ 42-301 to 309 (Supp. 1977).

2. R.C.M. 1947, §§ 42-401 to 442 (Supp. 1977).

3. R.C.M. 1947, §§ 42-302, 303 (Supp. 1977).

4. R.C.M. 1947, §§ 42-301 to 309 (Supp. 1977).

5. R.C.M. 1947, § 42-301(4) (Supp. 1977).

been caused by the tenant together with a sum equal to the unpaid rent owing to the landlord, plus an administrative and custodial expense not to exceed one percent of the security deposit.”<sup>6</sup> The legislature’s use of the phrase “custodial expense” raised a question as to whether it intended for the landlord to be able to only retain one dollar of a hundred dollar (\$100.00) damage deposit for cleaning required to return the premises to its rentable condition, or whether he was entitled to a dollar for the paper work involved in refunding the deposit and making the deductions for unpaid back rent and damage to the premises. Not surprisingly, no cases reached the supreme court on this issue. Experience and common sense, however, soon developed a judicial interpretation at the justice court level that any cleaning required to return premises to a rentable condition constituted damage by the tenant and the landlord was entitled to reimbursement. The 1977 legislature recognized the deficiency in the law and codified this interpretation by deleting the reference to the one percent administrative and custodial expense and substituting specific language on cleaning expenses.<sup>7</sup> In doing so they went further and imposed notice requirements, which provide that before a landlord can withhold any of the security deposit for cleaning expenses he must give 48 hours notice to the tenant, specifying “cleaning not accomplished by the tenant and the additional type or types of cleaning which need to be done by the tenant to bring the premises back to its condition at the time of its renting.”<sup>8</sup>

On its face this notice requirement places the landlord in the position of not being able to rent premises for 48 hours from the time of termination of the tenancy in order to protect his right to retain a portion of the security deposit for required cleaning. A closer examination of the statutory language discloses that the legislature set no specific time when this notice must be given.<sup>9</sup> A rental agreement clause providing for inspection of the premises for damage and cleaning 48 hours prior to the termination of the tenancy will rectify the problem. The landlord can then inspect, notify the tenant of the cleaning required and reclaim the premises as scheduled. It would seem likewise consistent with the law that those landlords who do

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6. As originally enacted, R.C.M. 1947, § 42-303 provided in part:

Any landlord renting property covered by this section may deduct from the security deposit a sum equal to the damage alleged to have been caused by the tenant together with a sum equal to the unpaid rent owing to the landlord at the time of such deduction and a sum for *administrative and custodial expenses, which expenses shall not exceed one per cent (1%) of the security deposit* (emphasis added).

7. R.C.M. 1947, § 42-303 (Supp. 1977).

8. *Id.*

9. *Id.*

not have this provision in their rental agreement should be able to accomplish the same end by exercising their statutory right to enter the premises and inspect its condition.<sup>10</sup> To do this the landlord must give the tenant 24 hours prior notice of his intent to inspect.<sup>11</sup>

I criticize the Security Deposit Act for its condition precedent to a landlord's ability to retain the security deposit or a portion thereof, for damage to the premises. The Act requires that upon termination of a tenancy the landlord must within thirty days provide the tenant with a written list of damages and cleaning expenses, which must be accompanied by payment of the difference, if any, between the security deposit and the specified charges. Failure to provide the list or refund the damage deposit or a portion thereof within the thirty day period, causes the landlord to forfeit all of the security deposit.<sup>12</sup> The same statutory language implies that the landlord also loses the right to sue for damages which may exceed the security deposit if he fails to comply.<sup>13</sup> If the landlord keeps the deposit, or a portion thereof, without providing a list of damages and refunding the difference in the damage deposit, the tenant is entitled to double damages and at the discretion of the court, attorneys fees.<sup>14</sup> As originally enacted, the law required that the list of damages be verified. This required the landlord to take his list of damages before a notary public and swear to its truth, a burdensome process for the landlord.<sup>15</sup> Fortunately, our legislature recognized that the veracity of the list of damages was not enhanced by the requirement of verification and these provisions were deleted.<sup>17</sup>

What of the situation where the tenant moved out in the middle of the night, leaving the premises in a shambles, and the landlord with no idea how to deliver the list of damages to the departed tenant? The Act provides that in these circumstances the landlord will be relieved from double liability, but the tenant shall not be barred from recovering the amounts actually owed.<sup>18</sup> This does not, however, relieve the burden of providing a list of damages within thirty days. For the landlord's protection the list of damages should

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10. R.C.M. 1947, § 42-424 (Supp. 1977). The right to inspect, while inherent in the common law, is now statutory and embodies what most landlords and tenants deem a common sense approach to inspection of the premises.

11. *Id.*

12. R.C.M. 1947, § 42-304 (Supp. 1977).

13. R.C.M. 1947, § 42-305 (Supp. 1977).

14. *Id.*

15. R.C.M. 1947, § 42-306 (Supp. 1977).

16. Prior to amendment in 1977, R.C.M. 1947, § 42-304 provided in part:

Every landlord . . . shall provide the departing tenant with a *verified* written list of any damage to the leasehold premises which the landlord alleges is the responsibility of the tenant (emphasis added).

17. R.C.M. 1947, § 42-304 (Supp. 1977).

18. R.C.M. 1947, § 42-307 (Supp. 1977).

be mailed within thirty days, certified, return receipt requested, to the last known address to the tenant, which presumably is the premises abandoned by the tenant.<sup>19</sup> If the letter is returned unclaimed, or if the tenant has left a forwarding address with the Post Office and the receipt comes back signed, you have the required proof to establish delivery. If the landlord retains the list and fails to attempt delivery, the Act provides a sufficient basis to argue that delivery was frustrated by the tenant, and the landlord should not be penalized when equity in fact shows that he is entitled to recompense for damages to the premises.

The Act further imposes an obligation upon the landlord to present a written statement of present condition together with a copy of the list of damages and cleaning charges provided the prior tenant to prospective tenants prior to the execution of any agreement, oral or written, for the rental of residential property.<sup>20</sup> If the landlord fails to provide the statement of present condition and the prior list of damages to the incoming tenant, the Act imposes a conditional bar to recovering damages, unless the landlord "can establish by clear and convincing evidence that the damage occurred during the tenancy in question" and that the tenant was directly or indirectly responsible for the damage.<sup>21</sup>

While this provision appears to be very restrictive and detrimental to the landlord's position, it actually works to his benefit. It places a burden on the tenant to inspect the premises at the time tenancy is created to make sure that all damages existing are disclosed in the statement of present conditions. If the tenant fails to do so, he can be charged for those damages regardless of their cause.<sup>22</sup>

Aside from the Act's apparent severity in terms of its notices, notice periods and penalties, the Act can be administered. Our justice courts by constitutional mandate are peoples' courts to provide

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19. R.C.M. 1947, § 42-307 specifies that the landlord is relieved from double liability as imposed by R.C.M. 1947, § 42-306, but it does not say that he is relieved from sending the list of damages. It may be implied, however, from the last sentence of the statute which reads "such failure shall not however bar the tenant from recovering the *actual* amount owing to him by the landlord" (emphasis added). This seems to indicate that if the tenant did not provide the address he would only be entitled to sue for the amount owed after deduction of damages.

20. R.C.M. 1947, § 42-308 (Supp. 1977).

21. *Id.*

22. Prior to the enactment of R.C.M. 1947, § 42-308, there were no statutory provisions relating to tenant's responsibilities for damages caused by prior tenants. It is clear that the tenant who receives the statement of present condition and list of prior damages and does not protest undisclosed damage to the landlord at the time of creation of the tenancy is going to be barred from later raising that defense.

justice in relatively simple disputes.<sup>23</sup> The justice courts "equitable" administration of this law greatly softens its jagged edges.

### III. THE MONTANA RESIDENTIAL LANDLORD AND TENANT ACT OF 1977

The Residential Landlord-Tenant Act represents a significant departure from Montana's prior statutory hands-off position on residential landlord-tenant relations. The Act has two stated purposes: to simplify and modernize by legislative enactments the laws relating to residential landlord-tenant relations;<sup>24</sup> and "to improve the quality of housing."<sup>25</sup> Both purposes, while laudable, are not accomplished by the Act. For example, the giving of notice is certainly not simplified by the Act, which provides specific circumstances under which either the landlord or the tenant may be deemed to have notice of a fact. While this notice may be either oral or written,<sup>26</sup> the newly created penalties mandate that notices be written and that the time and place of delivery be provable.<sup>27</sup> It's also questionable whether the Act will result in an improvement in the quality of housing since the Act's provisions on habitability are only different from the old law to the extent that they require a landlord to supply certain utilities.<sup>28</sup> The Act expands the already

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23. MONT. CONST. art. VII, § 5; R.C.M. 1947, §§ 93-408, 409.

24. R.C.M. 1947, § 42-402(2)(a) (Supp. 1977).

25. R.C.M. 1947, § 42-402(2)(b) (Supp. 1977).

26. R.C.M. 1947, § 42-412 provides:

- (1) A person has notice of a fact if:
  - (a) he has actual knowledge of it;
  - (b) in the case of a landlord, it is delivered at the place of business of the landlord through which the rental agreement was made; or
  - (c) in the case of a landlord or tenant, it is delivered in hand to the landlord or tenant or mailed by registered or certified mail to him at the place held out by him as the place for receipt of the communication or, in the absence of such designation, to his last known address.
- (2) Notice received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to his attention if the organization had exercised reasonable diligence.

This section provides that notice is sufficient if a person has actual knowledge, and such knowledge can be created by an oral statement.

27. Because the burden of proof is going to be on the person giving notice that notice was in fact given, or that the person receiving the notice had actual knowledge of the circumstance, it is imperative that the notices be written and receipts obtained if possible. If the person receiving notice will not acknowledge receipt, then the person delivering the notice should make an affidavit of service. With respect to the statutory requirement that written notices be mailed by registered or certified mail, note that registry and certification do not require that the recipient sign a receipt for the certified or registered letter which is returnable to the sender unless specifically requested and paid for.

28. As noted in the habitability section of this article, there is little change in the parties' actual obligations to maintain the premises. In this regard, compare R.C.M. 1947, §§ 42-201, 104, 105 with R.C.M. 1947, §§ 42-420, 422 (Supp. 1977).

widening gap between landlords and tenants, who now more than ever, treat each other as adversaries rather than friends and business acquaintances.

Because the Act is limited to residential rentals,<sup>29</sup> only two of Montana's prior statutory landlord-tenant laws were specifically repealed. The Act's title and provisions on construction against implicit repeal require that the Act be the final word on the establishment of a residential rental relationship. This leaves the prior Montana law intact for landlord-tenant relations which do not involve residential housing. Attached as Appendix A to this Article, is a table setting forth the "Residential Landlord and Tenant Act," with the corresponding old statutory or case law. Those with a more than casual interest in the subject matter should review Appendix A carefully. The similarities are surprising.

### A. *Habitability*

The Act's habitability and fitness of purpose provisions on their face appear to be sweeping changes in landlord's and tenant's obligations for the maintenance and upkeep of dwelling units. However, an examination of the old law discloses that the obligations existed under the old law, but were less specific and more subject to change by agreement.<sup>30</sup>

The landlord must construct new units in accordance with the applicable building and housing codes, make such repairs as are necessary to make the premises habitable, maintain all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities which are let with the premises, provide and maintain garbage collection devices and arrange for its collection, provide hot and cold running water and provide heat from October to May unless the water heaters and heating devices are under the exclusive control of the tenant. The landlord and tenant may agree, however, in cases where the building has three or less units, to certain modifications of the landlord's responsibility to maintain the premises and provide heat and water.<sup>31</sup> These rights are subject to certain limitations.<sup>32</sup>

Conversely, the Act requires a tenant to maintain the dwelling unit and specifies that he, too, must comply with "all obligations primarily imposed upon tenants" by building and housing codes, keep the premises clean, properly dispose of waste and garbage, keep all plumbing fixtures in a clean condition, use the property for its intended purposes, use the premises so as "not to disturb his

29. R.C.M. 1947, §§ 42-401, 407 (Supp. 1977).

30. R.C.M. 1947, §§ 42-201, 420, 422 (Supp. 1977).

31. R.C.M. 1947, § 42-420(1)(f) (Supp. 1977).

32. R.C.M. 1947, § 42-420(4) (Supp. 1977).



neighbors peaceful enjoyment of the premises," and last but not least, "not destroy, deface, damage, impair, or remove any part of the premises or permit any person to do so."<sup>33</sup> These obligations, particularly the provisions relating to destruction and damage of the premises, reach farther than the prior law, which made the tenant responsible only for damage "occasioned by his ordinary negligence."<sup>34</sup> While formal rental agreements in the past have held tenants to a stronger standard of care than that implied by the statute, the strength of our new provision imposes a duty on the tenant not only to refrain from damaging the premises, but further requires him not to permit anyone else to do so.<sup>35</sup>

The Act specifically covers the remedies available to both the landlord and tenant for non-compliance with the habitability provisions. If the landlord fails to comply, a tenant may give him notice specifying the breach and informing him that the rental agreement will terminate on some date certain (not less than thirty days) unless the breach is remedied within fourteen days.<sup>36</sup> If the same breach occurs within a six month period the tenant has the option of giving notice and terminating the rental agreement upon only fourteen days notice.<sup>37</sup> In no case, however, can the rental agreement be terminated if the condition complained of by the tenant was caused by the tenant or anyone on the premises with his consent.<sup>38</sup> After appropriate notice, if the tenant chooses not to terminate the rental, and the cost of repairing the dilapidation or defect does not exceed one month's rent, the tenant may elect to make the repairs himself and deduct the cost from the rent.<sup>39</sup> In addition the tenant has the right to file suit against the landlord to "recover actual damages and obtain injunctive relief for any noncompliance by the landlord with the terms of the rental agreement or § 42-420."<sup>40</sup> If the landlord fails to make the repairs, and the tenant terminates the rental agreement in the manner prescribed, the landlord must return "all security recoverable by the tenant pursuant to 42-301 through 42-309."<sup>41</sup> I interpret this to mean that the landlord is entitled to proceed in accordance with the Security Deposit Act, give the list of damages caused by the tenant and accordingly deduct the value of any repairs or unrepaired damage and necessary cleaning.

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33. R.C.M. 1947, § 42-422 (Supp. 1977).

34. R.C.M. 1947, § 42-105.

35. R.C.M. 1947, § 42-422(2) (Supp. 1977).

36. R.C.M. 1947, § 42-426(1) (Supp. 1977).

37. R.C.M. 1947, § 42-426(1)(a)(ii) (Supp. 1977).

38. R.C.M. 1947, § 42-426(1)(a)(iii) (Supp. 1977).

39. R.C.M. 1947, § 42-426(1)(b) (Supp. 1977).

40. R.C.M. 1947, § 42-426(2) (Supp. 1977).

41. R.C.M. 1947, § 42-426(4) (Supp. 1977).

It goes without saying, however, if a tenant can sustain the termination of a rental agreement because of the landlord's failure to repair defects or dilapidations in the premises, the landlord is going to be in a very difficult position to prove damage or defect caused by the tenant pursuant to the Security Deposit Act.

Consider the problem of the landlord who attempts to deduct rental due to date of termination under the terms of the Security Deposit Act where the tenant has terminated the tenancy because of the failure of the landlord to properly maintain the premises. The landlord's non-compliance with the provisions of Section 42-420 standing by itself constitutes a defense to any action by the landlord for possession or rent.<sup>42</sup> The statute appears broad enough to extend these defenses to actions under the Security Deposit Act for damages in excess of the deposit or unpaid rent.

If an action by the landlord in excluding the tenant from the premises or diminution of services required under Section 42-420 is intentional and purposeful, the tenant is entitled to recover possession of the premises, have the services restored, or terminate the rental agreement.<sup>43</sup> In addition to these remedies, the tenant is entitled to three months periodic rents or treble damages, whichever is greater.<sup>44</sup> If, for example, a landlord shuts off the heat in a premises (where the landlord is required by the terms of Section 42-420 to provide heat) a tenant's damage could be three times the cost of a motel, and any damage to personal effects, food or other freezable items which might be damaged due to the lack of heat, plus attorney's fees.

Conversely, the landlord's remedies for failure of the tenant to comply with the terms of the rental agreement or the provisions of Section 42-422 are similar.<sup>45</sup> If the tenant's breach affects health and safety (his own or that of others) the landlord must give written notice setting forth the nature of the breach and the date on which the rental agreement will terminate if the tenant fails to cure the breach (the termination date must not be less than fourteen days from the date of receipt of such notice).<sup>46</sup> If a substantially similar breach occurs within any six month period the landlord may terminate the rental agreement by giving only five days written notice.<sup>47</sup> If a tenant fails to pay the rent when due, the landlord may terminate the rental agreement three days following the date of notice

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42. R.C.M. 1947, § 42-430 (Supp. 1977).

43. R.C.M. 1947, § 42-432 (Supp. 1977).

44. *Id.*

45. R.C.M. 1947, § 42-433 (Supp. 1977).

46. R.C.M. 1947, § 42-433(1) (Supp. 1977).

47. R.C.M. 1947, § 42-433(1)(b) (Supp. 1977).

and at that point file suit for possession, recover his actual damages and such judicial assistance as may be required to remove the tenant from the premises.<sup>48</sup>

Further, if the landlord can show that the tenant's noncompliance or breach was intentional or purposeful the damages may be trebled.<sup>49</sup> As an alternative to or in conjunction with a termination of a rental agreement, for a breach which is detrimental to health and safety, if "repair, replacement of a damaged item, or cleaning" will remedy the breach, and the tenant fails or refuses to correct the condition (subject to appropriate notice and/or emergency conditions) the landlord may cause the repairs or replacement to be done in a workmanlike manner and submit a bill for the cost of such replacement or repair for payment by the tenant when the next periodic rental payment is due or in the case of a terminated rental agreement, immediately.<sup>50</sup>

The landlord must be careful after giving notice of breach pursuant to Section 42-433 not to waive the statutory termination rights. Acceptance by the landlord of the payment of rents in full after the three day period has elapsed, or acceptance of "tenant's performance that varies from the term of the rental agreement" will constitute a waiver of the right of termination "unless otherwise agreed after the breach has occurred."<sup>51</sup>

### B. *Rental Agreement*

A rental agreement may be either oral or written<sup>52</sup> and may include only provisions which are not specifically prohibited by law.<sup>53</sup> A cursory review of the Montana Residential Landlord and Tenant Act might indicate that written rental agreements are no longer necessary because of the Act's specific provisions on the rights and obligations of the parties. While the Act specifies how and when rent is due and payable, who must maintain the premises, who is responsible for the payment of utilities, how to dispose of abandoned property, how the parties may terminate a tenancy and under what circumstances, it also provides a great deal of latitude for the parties to define their own relationship according to terms and conditions of a written agreement which fit their particular needs.<sup>54</sup>

48. R.C.M. 1947, § 42-433(2) (Supp. 1977).

49. R.C.M. 1947, § 42-433(3) (Supp. 1977).

50. R.C.M. 1947, § 42-434 (Supp. 1977).

51. R.C.M. 1947, § 42-436 (Supp. 1977).

52. R.C.M. 1947, § 42-409(10) (Supp. 1977).

53. R.C.M. 1947, §§ 42-413, 415 (Supp. 1977).

54. An example of this latitude is found in R.C.M. 1947, § 42-435. Unless the Act specifically prohibits a provision or specifies a fixed notice, rental agreements may define the parties' rights and obligations.

The written rental agreement or lease should embody all of the terms by which the landlord and tenant agree to be bound.<sup>55</sup> There are certain statutory terms which cannot be changed, such as those contained in the Security Deposit Act<sup>56</sup> and the specific prohibitions found in the Montana Residential Landlord and Tenant Act.<sup>57</sup> Other provisions within the Act require a written election by the parties in order to agree on certain alternatives.<sup>58</sup>

As part of a rental agreement, a landlord is authorized to adopt rules and regulations.<sup>59</sup> Generally, these are done as a separate document attached to the rental agreement. The landlord may amend the rules and regulations and relate the amendments back to rental agreements in existence at the time of their adoption, provided that he gives notice to the tenant as to the changes.<sup>60</sup> Typically, items included in rules and regulations will be provisions relating to the following:

1. Swimming pools and regulations, including hours of use, and parental responsibility for minor children.
2. Use of laundry and storage facilities.
3. Improper parking of automobiles, restrictions of certain kinds of vehicles such as motorcycles, or other off road vehicles.
4. Control of children and children's play areas, restrictions against children playing in halls, on stairways and walkways.
5. Rules pertaining to quiet enjoyment, disturbing neighbors, prohibiting unreasonable noise from televisions, stereos, radios, etc. after specified hours.
6. Regulations pertaining to pets.
7. Disposition of personal property left on walkways, stairways, in hallways and other common areas.
8. Use of sinks, toilets, or garbage disposals for other than their intended purposes.
9. Unlawful cohabitation by unmarried persons of the opposite sex:

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55. Simple common sense dictates that any agreement contain the entire understanding of the rights and obligations of the parties. Consider the possibility of including in your rental agreement a clause which by reference incorporates the Residential Landlord and Tenant Act. While the provision is legally unnecessary, it puts the parties on notice that the Act governs their relationship. It may also be appropriate to provide the tenants with a copy of the Act at the time the rental agreement is executed.

56. R.C.M. 1947, §§ 42-301 to 309 (Supp. 1977).

57. R.C.M. 1947, § 42-415 (Supp. 1977).

58. R.C.M. 1947, §§ 42-435, 420(3), (4) (Supp. 1977).

59. R.C.M. 1947, § 42-423(1) (Supp. 1977).

60. R.C.M. 1947, § 42-423(2) (Supp. 1977). The notice required is keyed to the length of the tenancy. Seven days notice is required for a tenancy from week to week; thirty days notice is required for a tenancy from month to month. Presumably in lease situations a landlord would not be entitled to change the rules and regulations governing the lease during the lease term.

With respect to rules and regulations governing unlawful cohabitation by persons of the opposite sex, I have specifically ignored any constitutional questions that may be raised by such regulations. Many cities have adopted zoning regulations specifically prohibiting cohabitation and until these ordinances have been declared unconstitutional, those landlords who choose to regulate the morality of their tenants may do so.<sup>61</sup>

### 1. *Unsigned Rental Agreements*

An unsigned rental agreement may be binding upon the parties. If the landlord accepts rent or a tenant pays rent after delivery to that party of a written rental agreement prior to its signing, that rental agreement will have the same effect as if it had been signed. In the case of a lease, for a period in excess of twelve months, an unsigned lease which is delivered and accepted by acceptance or payment of rent will have an effective period of twelve months regardless of the terms specified.<sup>62</sup>

### 2. *Temporary Absences*

If a tenant leaves the premises unattended for more than seven successive days without notifying the landlord, the rental agreement may terminate. If the parties agree in writing as part of their rental agreement, a landlord may require a tenant to give notice of his intention to be absent from the rented premises for a period in excess of seven days.<sup>63</sup> If the rental agreement so provides, and the tenant does not give notice, the landlord may deem the property abandoned, re-rent the premises to another party, dispose of the tenant's belongings left on the premises,<sup>64</sup> and recover his actual damage in terms of lost rental, and the cost of cleaning and required repairs.<sup>65</sup> These provisions are of particular importance in college towns and can operate to the detriment of both landlord and tenant if a proper understanding is not reached as to what constitutes notice.<sup>66</sup> For example, a college student who rents an apartment,

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61. R.C.M. 1947, § 42-423 (Supp. 1977). While this position will undoubtedly be subject to dispute, our statute provides that a landlord may adopt rules concerning the tenant's use and occupancy of the premises. Such rules will only be enforceable if their purpose is to promote the convenience, safety or welfare of the occupants. The position that I have taken is that regulations prohibiting cohabitation by persons of the opposite sex are consistent with this statute in that they are for the welfare of the other tenants in the unit, particularly where young families may be involved.

62. R.C.M. 1947, § 42-414 (Supp. 1977). This provision is a significant departure from prior law in that it has the effect of creating an agreement by omission.

63. R.C.M. 1947, §§ 42-425, 435 (Supp. 1977).

64. R.C.M. 1947, § 42-437 (Supp. 1977).

65. R.C.M. 1947, § 42-303 (Supp. 1977).

66. R.C.M. 1947, § 42-412 (Supp. 1977).

goes home for Christmas vacation and neglects to notify the landlord of his intended absence could return to find his personal property in storage and his apartment rented to a new tenant. The college student would argue that the landlord had notice of his intent to leave because he knew it was Christmas break and that students go home, but the landlord may prevail even though equity is frustrated because the notice provisions of the Act have not been complied with.<sup>67</sup>

### 3. *Notice Provisions*

The definition of notice should be clearly stated in the rental agreement. By using the statutory language contained in Section 42-412 verbatim as the definition of notice in your rental agreement you will alleviate any confusion as to what constitutes notice.<sup>68</sup>

The specific notice periods, such as the amount of time required for termination of tenancy, the length of time either party will have to remedy a breach after notification and the landlord's notices of intent to enter the premises and repair or inspect are all set by statute.<sup>69</sup> These notice periods may not be modified by the terms of the rental agreement. The Act contains specific prohibition against waiver by either party of any right or remedy provided therein.<sup>70</sup> The intent of the Act is clearly to avoid adhesion contracts which bind tenants to unconscionable provisions in rental agreements, such as confessed judgments and waivers of notice.<sup>71</sup> Not only are these provisions prohibited and unenforceable, if a party purposefully provides a rental agreement which waives or foregoes rights, authorizes a confession of judgment or provides for a prohibited limitation of liability, the other party may recover his actual damages and punitive damages not to exceed three months rent.<sup>72</sup> These provisions apply most often to landlords because tenants seldom dictate the terms and conditions of rental agreements. I find it unfortunate that reasonable people should not be able to determine the length of notice required in their own particular circumstances. For example, fifteen days notice by the tenant of his intent to terminate should be adequate to afford the landlord the time required to re-rent the premises. The unconscionability provisions of the Act pro-

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67. The actual knowledge provisions contained in R.C.M. 1947, § 42-412(1)(a) could cause some problems in this regard and the rental agreement should deal specifically with this kind of situation.

68. R.C.M. 1947, § 42-412 (Supp. 1977). See note 26, *supra*, for the text of this provision.

69. R.C.M. 1947, §§ 42-420, 422, 424, 440 (Supp. 1977).

70. R.C.M. 1947, § 42-415(1)(a) (Supp. 1977).

71. Commissioners' Comment, UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.403 (1972).

72. R.C.M. 1947, § 42-415(2) (Supp. 1977).

tect the parties from unreasonable provisions in rental agreements.<sup>73</sup> The law specifies that a court may rule a provision of a rental agreement unconscionable, and refuse enforcement of the entire agreement or just strike the provision and modify the terms of the agreement.<sup>74</sup>

#### 4. *Security Deposits*

The provisions of the Security Deposit Act should be dealt with specifically in the rental agreement. There should be an acknowledgement by the tenant of receipt of a statement of present condition and a copy of the preceding tenant's list of damages (this is only applicable in the case of previously rented premises).<sup>75</sup> While the Security Deposit Act defines damage and cleaning expense, a rental agreement can, and should, deal with the issue of pets and their effect on the security deposit,<sup>76</sup> define specifically what portion of the premises is covered by the security deposit and whether certain specific acts of cleaning such as cleaning of drapes or carpets will be required of tenants upon termination of tenancy.

Query whether or not it is possible in Montana to charge a cleaning fee which is non-refundable? In the past, landlords have required a refundable damage deposit and a nonrefundable cleaning fee utilized for purposes of cleaning carpets and drapes, etc. If the landlord has in the past cleaned the drapes and carpets after the termination of each tenancy and the cleaning fee reasonably represents the amount required to do that cleaning (or less), an argument

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73. R.C.M. 1947, § 42-411 (Supp. 1977).

74. R.C.M. 1947, § 42-411(1)(a) (Supp. 1977). The Commissioners' Comment to this section provides:

This Section, adapted from the Uniform Commercial Code and the Consumer Credit Code, is intended to make it possible for the courts to police explicitly against rental agreements, clauses, settlements, or waivers of claim or right which they find to be unconscionable. This section is intended to allow the courts to pass directly on the issue of unconscionability and to make a conclusion of law as to unconscionability. The basic test is whether, in light of the background and setting of the market, the conditions of the particular parties to the rental agreement, settlement or waiver of right or claim are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the agreement or settlement. Thus, the particular facts involved in each case are of utmost importance since unconscionability may exist in some situations but not in others. Either landlords or tenants may, in appropriate circumstances, avail themselves of this section.

UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT, § 1.303 (1972).

75. R.C.M. 1947, §§ 42-304, 308 (Supp. 1977).

76. Pets raise a specific problem. Rather than the exclusion of pets many landlords choose to attach a pet addendum to their rental agreement which provides for the payment of an additional pet security deposit and defines the specific purposes for which the pet security deposit will be used. For example, the damage to carpets and drapes by people owning cats can be expensive.

can be made that the fee is not a security deposit and is not subject to the provisions of the Security Deposit Act.<sup>77</sup>

### 5. *Abandoned Property*

If a tenancy terminates, and personal property is left in the premises, the landlord may dispose of the property.

(1) If a tenancy terminates in any manner except by court order and the landlord reasonably believes that the tenant has abandoned all personal property which the tenant has left on the premises, the landlord shall:

(a) make reasonable attempts to notify the tenant in writing that the property must be removed:

(i) from the premises, or

(ii) from the place of safekeeping if the landlord has stored the goods as provided in subsection (3) of this section; and

(b) specify a day not less than 15 days after delivery of a notice, mailed by certified mail to the last known address of the tenant at which specified time the property will be disposed of if not removed.<sup>78</sup>

If the landlord disposes of the property in accordance with these provisions, he may sell it at a public or private sale,<sup>79</sup> and destroy that portion which he believes to have little value and not worth the cost of storage or sale.<sup>80</sup>

If the tenant reclaims the property pursuant to the notice, and the landlord has stored the property in accordance with the Act, the tenant must pay the actual storage costs plus any cost of removing the property to the place of storage.<sup>81</sup> If the landlord sells the property pursuant to this section, and there are excess proceeds, the landlord must make reasonable efforts to return the excess to the tenant, and if he cannot do so, deposit the excess with the county treasurer in the county in which the sale occurred.<sup>82</sup>

The disposition of abandoned property provisions of the Act are refreshingly new in that we no longer have to obtain a court order in order to clean out a premises or to put a tenant's property in

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77. My position on non-refundable cleaning deposits is not without its problems. It is arguable that any amount of money charged for cleaning comes under the definition of security deposit contained in R.C.M. 1947, § 42-301. However, I have taken the position that the non-refundable cleaning fee is a pre-paid expense and should be treated as additional rental rather than a security deposit subject to the act.

78. R.C.M. 1947, § 42-437 (Supp. 1977).

79. R.C.M. 1947, § 42-437(2)(a) (Supp. 1977).

80. R.C.M. 1947, § 42-437(2)(b) (Supp. 1977).

81. R.C.M. 1947, § 42-437(4) (Supp. 1977).

82. R.C.M. 1947, § 42-437(7) (Supp. 1977).



storage. Your rental agreement should include language which specifies how, when and where property will be disposed of if deemed abandoned. The language of the statute is too cumbersome to use verbatim in your rental agreement. A provision similar to the following would be appropriate:

Any personal property belonging to the tenant which remains on the premises after termination of this agreement, or after the tenant has vacated the premises, whichever occurs first, shall be disposed of in accordance with provisions contained in the Revised Codes of Montana 1947, Section 42-437 which deals with the disposition of abandoned property.

## 6. *Maintenance and Upkeep*

The statutory requirements of maintenance and upkeep of the premises may be modified by a rental agreement. The statutes previously discussed in the habitability section of this article specify the duties and responsibilities of the landlord and tenant for the maintenance and upkeep of the premises. In buildings containing not more than three family units, the landlord and tenant may agree to modification of the responsibility for the maintenance, repair, and supply of utilities.<sup>83</sup> This modification must be made in good faith and not for the purpose of evading the obligations of the landlord prescribed by the statute.<sup>84</sup> The specification of responsibility for maintenance is extremely important in the rental agreement as under the law the landlord is responsible to "keep common areas of the premises in a clean and safe condition."<sup>85</sup> For example, the landlord would be responsible for removing snow and leaves from a common sidewalk leading to the entry door of a duplex or tri-plex. This likewise could mean that the landlord would be responsible for picking up toys and other debris left by uninvited visitors in a common hallway between two apartments. It could also mean that the landlord is obligated to mow the lawn and care for flower beds and other garden spots adjacent to an area commonly utilized by both tenants in a duplex. Lest I be misunderstood, it is not inappropriate for a landlord to perform these functions, but these responsibilities should be defined in the rental agreement, and not left to statutory interpretation.

## 7. *Landlord's Access to Premises*

In order to gain access to rented premises the landlord must

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83. R.C.M. 1947, § 42-420(3), (4) (Supp. 1977).

84. R.C.M. 1947, § 42-420(4)(a) (Supp. 1977).

85. R.C.M. 1947, § 42-420(1)(c) (Supp. 1977).

give notice to the tenant. There has been extensive unreported litigation in the area of a landlord's abuse of access to rented premises. The Act provides specific guidelines for a landlord to gain access to premises for repairs, alterations or inspection:

- (1) A tenant may not unreasonably withhold consent to the landlord or his agent to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, decorations, alterations, or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen, or contractors.
- (2) A landlord may enter the dwelling unit without consent of the tenant in case of emergency.
- (3) A landlord may not abuse the right of access or use it to harass the tenant. Except in the case of emergency or unless it is impracticable to do so, the landlord shall give the tenant at least 24 hours' notice of his intent to enter and may enter only at reasonable times.
- (4) A landlord has no other right of access except:
  - (a) pursuant to court order;
  - (b) as permitted by 42-434 and 42-435(2); or
  - (c) when the tenant has abandoned or surrendered the premises.<sup>86</sup>

Much of the statutory language on access by the landlord is unnecessary in a rental agreement. The following provision should suffice:

The landlord shall have access to the dwelling unit in order to inspect the premises, make necessary or agreed repairs, decorations, alterations, or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen, or contractors.

If the landlord wishes to enter the dwelling to inspect, make repairs, decorations, alterations, or improvements, supply necessary or agreed services, the landlord shall give the tenant at least 24 hours' notice of the time and purpose of his entry to the premises, if practical.

Where it is impracticable to give 24 hours' notice to exhibit the dwelling to prospective or actual purchasers, mortgagees, prospective tenants, workmen, or contractors, the landlord shall give the tenant reasonable notice and exhibit the dwelling unit at times which are convenient to the tenant, in the tenant's presence, or with the tenant's express written permission to exhibit the premises in his absence.

This provision allows the landlord access with the express written permission of the tenant to show the premises to prospective

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86. R.C.M. 1947, § 42-424 (Supp. 1977).

tenants without the necessity of the 24 hour notice. The spirit of the law is to allow the tenant reasonable warning of invasions of his privacy when necessitated by the needs of the landlord. The key word in this last paragraph which makes it compatible with the 24 hour notice provision is the requirement that the showing be convenient to the tenant. The law allows access without 24 hour notice if such notice is impracticable.<sup>87</sup> Where a prospective tenant responds to a newspaper advertisement for the rental of the unit, 24 hours' notice is realistically impracticable. Tenants who have given notice of termination of the tenancy are generally more than willing to sign a written authorization for the landlord to show the premises if the landlord will first call and determine if it is convenient for the tenant. Remember that the agreement cannot require the tenant to give the landlord access to the premises without the 24 hour notice.<sup>88</sup> If the tenant balks at signing the authorization, the landlord is well advised not to press the issue and to show the property only in the presence of the tenant.

## 8. *Default Provisions*

The parties may terminate a rental agreement for violation of the agreement or law under certain circumstances. As previously discussed in the habitability portion of this article, if the landlord or tenant fails to comply with the terms of the rental agreement or the provisions set forth in Sections 42-420 and 422 respectively, the aggrieved party may give notice of the breach and intent to terminate the rental agreement if the defect or breach is not promptly cured.<sup>89</sup> In a rental agreement it should specify clearly the terms under which the agreement may terminate. The following default clause meets the statutory minimum requirements:

If tenant defaults in the payment of any rent, required by this agreement, tenant's rights under this Agreement shall terminate and be forfeited, and landlord may re-enter the premises, retake possession and recover damages, including costs and attorneys'

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87. *Id.*

88. *Id.* In the case of a breach by the tenant, the defect must be cured within 14 days.

89. The periods in which the parties can correct defaults are provided in R.C.M. 1947, §§ 42-426, 433, and can be summarized as follows:

1. Default by landlord
  - (a) first breach: remedy within 14 days, otherwise tenancy may terminate after 30 days;
  - (b) second breach within 6 months: terminate upon 14 day notice;
2. Default by tenant
  - (a) failure to pay rent: remedy within 3 days;
  - (b) other breach of agreement: remedy within 14 days;
  - (c) second breach within 6 months: terminate upon 5 day notice.

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fees, for actual damages suffered. Tenant shall have three (3) days from receipt of notice in writing to cure the breach and avoid termination and forfeiture of this agreement by payment of the rent therein specified.

If tenant defaults in any of the other terms or conditions of this agreement, or the regulations attached hereto, or other obligations imposed upon tenant by the provisions of the Montana Residential Landlord and Tenant Act (R.C.M. 1947. Sections 42-401 through 447 inclusive), this agreement shall terminate and be forfeited and the landlord may re-enter the premises and retake possession and recover damages, including costs and attorneys' fees, for actual damages suffered. Tenant shall be given fourteen days notice in writing of any such default or breach, and termination and forfeiture of this agreement shall not result if within fourteen days of receipt of such notice tenant has corrected the default or breach or has taken action reasonably likely to effect such correction which is acceptable to landlord and acknowledged in writing. If landlord gives notice of default pursuant to this paragraph for a default or breach which is substantially the same as one for which tenant has received notice within the preceding six months, tenant shall be given five days notice in writing of such default or breach and the fact that it is deemed by landlord to be a second or subsequent breach within six months, and the termination or forfeiture of the agreement shall not result if within five days of receipt of such notice tenant has corrected the default or breach. Tenant's failure to quit the premises and peaceably return possession to landlord upon such termination shall result in landlords instituting an action for possession or unlawful detainer in any court competent to hear such action, for damages, attorneys' fees, and possession of the premises hereby let.

If landlord defaults in the performance of or compliance with any term or condition hereof, or the obligations imposed upon landlord by the Montana Residential Landlord Tenant Act (R.C.M. 1947, Sections 42-401 through 447 inclusive), the tenant may terminate this agreement thirty days after giving landlord notice in writing of such default or breach, and the termination and forfeiture of this agreement shall not result if within fourteen days of receipt of such notice the landlord has corrected the default or breach or has taken action reasonably likely to effect such correction within a reasonable period of time. In addition to the rights and remedies of tenant created by this paragraph, the tenant may exercise all rights and remedies granted tenant by Sections 42-426 through 430 and 432 of the Montana Residential Landlord and Tenant Act.

## 9. *Voluntary Termination*

The parties to a rental agreement may terminate a month to month tenancy upon thirty days notice. Under prior law, a party to a rental agreement which represented a month to month tenancy

had to give thirty days notice of intent to terminate the agreement prior to the commencement of a rental period.<sup>90</sup> Now, either party may terminate a week to week tenancy with seven days notice,<sup>91</sup> and a month to month tenancy with thirty days notice,<sup>92</sup> in writing prior to any date specified by the terminating party. If the rent is due on the first of the month, the tenant may give notice on the fifteenth of the month and is obligated for rental on the premises only to the fifteenth of the following month, not to the thirtieth of the following month as previously required. To avoid confusion on this point, the rental agreement language addressing termination without cause should correlate closely to the language contained in Section 42-440.

#### IV. EVICTION

The eviction process has a new complexion under the Montana Residential Landlord and Tenant Act. The traditional remedies of forcible entry and unlawful detainer<sup>93</sup> are supplemented by an "action for possession." This action may be brought by either landlord or tenant to reclaim the rented premises. As a matter of statutory construction, the Act and our forcible entry and unlawful detainer statutes should be harmonized whenever possible so as to achieve the Act's salutary goals.<sup>94</sup>

Since the forcible entry and unlawful detainer statutes were not repealed<sup>95</sup> or limited coincident to adoption of this Act, unlawful detainer actions are still available to landlords as an eviction tool. Their chief value, particularly in light of the Act's incomplete jurisdictional and procedural provisions, is simplicity and certainty. However, the Act provides the tenant with certain defenses which are new to unlawful detainer actions in Montana. These include retaliatory conduct by the landlord,<sup>96</sup> and his non-compliance with the Act or the terms of a rental agreement.<sup>97</sup> Since these defenses are intended to apply to actions for possession, it could be argued that they should not be available in an unlawful detainer action. This position, however, is untenable because it frustrates and defeats the Act's stated purpose "to simplify, clarify, modernize and revise the law governing the rental of dwelling units and the rights

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90. R.C.M. 1947, § 42-206.

91. R.C.M. 1947, § 42-440(1) (Supp. 1977).

92. R.C.M. 1947, § 42-440(2) (Supp. 1977).

93. R.C.M. 1947, §§ 93-9701 to 9720.

94. *McCall v. Fickes*, 556 P.2d 535, 539 (Alaska 1976). "We are in agreement with this salutary approach and conclude that as a matter of statutory construction, the Uniform Residential Landlord and Tenant Act should be harmonized with our Forcible Entry and Detainer Statutes."

95. Only R.C.M. 1947, §§ 42-201, 204 were repealed. 1977 Mont. Laws, ch. 313, § 45.

96. R.C.M. 1947, § 42-442 (Supp. 1977).

97. R.C.M. 1947, § 42-430 (Supp. 1977).

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and obligations of landlords and tenants . . . .”<sup>98</sup> If these defenses could not be asserted by tenants in unlawful detainer proceedings, “the plaintiff, by choosing the statutory section under which to proceed, could limit the tenant’s right to assert defenses.”<sup>99</sup> In addition to these new defenses, unlawful detainer actions continue to remain subject to the common law defenses such as tortious interference with the tenant’s right to take possession and quiet enjoyment of the premises.

The Act now allows a landlord to assess and collect attorneys’ fees from a tenant incident to unlawful detainer actions.<sup>100</sup> This assumes that the landlord is the prevailing party and that the court exercises its discretion in his favor. Under prior law the landlord could recover attorneys’ fees only if the rental agreement so provided.<sup>101</sup> Conceivably, both parties could prevail, but on different issues; the landlord could be awarded possession of the premises, while the tenant would simultaneously be awarded damages for the landlord’s non-compliance with a provision of the Act.<sup>102</sup> In these circumstances it is possible that the court would award attorneys’ fees to both parties.

Under prior law the eviction process requires, for causes other than the tenant’s default of payment of rent, that the landlord give the tenant thirty days notice before the expiration of the term.<sup>103</sup> Next, before the landlord can bring an unlawful detainer action, he is required to give the tenant a three day notice.<sup>104</sup> Under the Act the landlord need only give the tenant thirty days notice at any time, regardless of when the rental term would have ended.<sup>105</sup> In addition, the Act does not require the landlord to give the tenant three days notice before commencing an action for possession. The practitioner who is called upon to bring an action for unlawful detainer should always refer to the statute for the necessary elements.<sup>106</sup>

The new “action for possession”<sup>107</sup> cuts both ways, and provides an aggrieved landlord or an aggrieved tenant with a remedy for possession. The tenant’s suit anticipates a situation where the prior

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98. R.C.M. 1947, § 42-402(1)(a) (Supp. 1977).

99. *McCall v. Fickes*, 556 P.2d 535, 541 (Alaska 1976).

100. R.C.M. 1947, § 42-417 (Supp. 1977). An unlawful detainer action falls under this provision because it is “an action on a rental agreement.”

101. *Kintner v. Harr*, 146 Mont. 461, 408 P.2d 487 (1965); *Roseneau Foods, Inc. v. Coleman*, 140 Mont. 572, 374 P.2d 87 (1962).

102. R.C.M. 1947, § 42-430 (Supp. 1977).

103. R.C.M. 1947, § 42-206.

104. R.C.M. 1947, § 93-9703(3).

105. R.C.M. 1947, § 42-440(2) (Supp. 1977).

106. R.C.M. 1947, § 93-9703.

107. This action is discussed in R.C.M. 1947, §§ 42-409(1), 427(1), 438, 439, 440, 442 (Supp. 1977).

tenant is a holdover and the landlord has failed to deliver possession of the premises. The landlord's action for possession, while its form is not detailed by the Act, assumes all the characteristics of an unlawful detainer action except for the statutes under which it is pled, the defenses available, and the courts in which the action may be brought.

Since the Act regulates the rights and obligations of landlords and tenants, and provides remedies for interference by the landlord of the tenant's use and quiet enjoyment of the rented premises,<sup>108</sup> it follows that the common law defenses will not apply to actions for possession. The only defenses should be those provided by the Act.<sup>109</sup>

Residential landlord and tenant disputes have traditionally been handled in justice courts. However, the legislature did not grant them jurisdiction to decide actions for possession. In adopting the Act our legislature neglected to include jurisdictional and procedural sections which appear in the Uniform Residential Landlord and Tenant Act.<sup>110</sup> Apparently, the framers of our Act never considered the fact that without a jurisdictional enabling statute for justice courts the only courts with jurisdiction to decide actions for possession would be the district courts.<sup>111</sup> Because landlords are comfortable in justice courts and familiar with their procedures landlords may be expected to continue to rely on the unlawful detainer action as their eviction remedy. Aside from their familiarity with justice courts, it is unrealistic for the state to expect landlords to seek an eviction remedy in our district courts which are already burdened with matters of more serious import.

## V. RETALIATORY CONDUCT

The Act deals specifically with the problem of retaliatory conduct on the part of the landlord.

[A] landlord may not retaliate by increasing rent, decreasing services, or by bringing or threatening to bring an action for possession after the tenant:

(a) Has complained of a violation applicable to the premises materially affecting health and safety to a governmental agency charged with responsibility for enforcement of a building or housing code;

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108. R.C.M. 1947, § 42-432 (Supp. 1977).

109. R.C.M. 1947, §§ 42-430, 442 (Supp. 1977).

110. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 1.203 (1972).

111. "Justice courts shall have such original jurisdiction as may be provided by law . . . ." MONT. CONST. art. VII, § 5(2). See R.C.M. 1947, §§ 93-408, 409. This jurisdictional defect only applies to the action for possession and not to actions for collection of rents or general damages as the justice courts clearly have such jurisdiction under R.C.M. 1947, § 93-408.

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- (b) Has complained to the landlord in writing of a violation under § 42-420; or
- (c) Has organized or become a member of a tenant's union, or similar organization.<sup>112</sup>

The Act further provides that any rental increase, decrease in services, or threat of or the institution of a suit for possession, which occurs within six (6) months after any of the above stated situations, creates a rebuttable presumption that his action was retaliatory.<sup>113</sup> These provisions are new and represent a limitation on the landlord's right to control his rented premises. Landlords should be careful in attempting to evict a tenant with whom he has had prior difficulty, and who has made complaints in any of the three areas specified above. While the presumption of retaliation is rebuttable the landlord must be able to produce evidence to rebut the presumption and should not even attempt to regain possession, raise rent, or diminish services without first having sufficient justification to meet and rebut the presumption of retaliation.

Exceptions to the rules on retaliatory conduct allow the landlord to regain possession of the premises under certain circumstances if:

- (a) The violation of the applicable building or housing code was caused primarily by lack of reasonable care by the tenant, a member of his family, or other person on the premises with his consent;
- (b) The tenant is in default in rents; or
- (c) Compliance with the applicable building or housing code requires alteration, remodeling, or demolition which would effectively deprive the tenant of the use of the dwelling unit.<sup>114</sup>

If a landlord is found to have retaliated against a tenant by raising the rent, diminishing services, filing a suit for possession, or threatening such a suit he will be subject to penalties amounting to "three (3) months periodic rent, or trebled damages, whichever is greater."<sup>115</sup>

While the Act speaks in terms of retaliatory conduct and not retaliatory eviction, it has the practical effect of doing both. If notice is given, the landlord would in affect be barred from enforcing the termination, either by an action for possession or unlawful detainer, or even threatening to. Since the Act provides the rules governing residential landlord and tenant relations, the defenses available under the Act, including the defense of retaliatory conduct, will be available to the tenant. Query whether a landlord's notice of termi-

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112. R.C.M. 1947, § 42-442(1) (Supp. 1977).

113. R.C.M. 1947, § 42-442(2) (Supp. 1977).

114. R.C.M. 1947, § 42-442(3) (Supp. 1977).

115. R.C.M. 1947, § 42-432 (Supp. 1977).



nation would constitute a threat to bring a suit for possession under the retaliatory conduct section?

## VI. PRACTICE UNDER MONTANA'S NEW LANDLORD-TENANT LAWS

One of my colleagues with Montana Legal Services once remarked, "The lawyer's greatest challenge is how to practice under the new landlord and tenant laws and make a living." Economics dictate that for a lawyer to survive he must be able to generate reasonable fees for his services. If the nature of the work will not generate those fees, then the services will either not be available to the client, or the client will suffer by having the problem placed on the back burner in favor of more profitable and challenging matters.

We have a professional responsibility to provide the client with the services he requires regardless of the specific economic circumstances.<sup>116</sup> I see the solution to our dilemma in the redefinition of the lawyer's role in landlord and tenant relations. In the past, lawyers served as advocates representing the positions of their respective clients either in negotiations, or in court. Under the new law many of the problems that arise in landlord and tenant disputes have very specific statutory solutions. If the lawyer assumes the role of educator and counselor rather than advocate and litigator, he can be adequately compensated for his time, provide the service and give his clients the attention they deserve.

As the first retained counsel for the Western Montana Landlord's Association I had the opportunity to observe landlords trying to cope with new laws that they neither understood nor appreciated. Through the process of education, at monthly meetings, and in private sessions dealing with specific problems, I saw the unsure and frustrated landlord evolve into a self sufficient individual capable of handling most of the day-to-day problems encountered under the new law. The nature of my contact with landlords changed; instead of asking me to solve their problems, they began asking me how do I deal with the problem, how do I file suit, or how do I allege damages. The change was gratifying, and I might add, profitable.

As counsel for the landlord's association I prepared a procedures manual designed to familiarize landlords with the law and how to establish a proper relationship with their tenants. In addition, the association prepared a rental packet including an application to rent, a form rental agreement, property condition statement, list of damages, statement of intention to rent, rental deposit agreement and notice of cleaning required for return of security deposit. These forms are attached as Appendix B for your reference. When

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116. ABA CANONS OF PROFESSIONAL ETHICS No. 2.

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a landlord joins the association he receives a procedures manual, and he may purchase the packet of forms for a nominal price. The practitioner who deals with landlord-tenant problems could easily develop his own set of forms (a packet available to his clients) and simple procedures manual for his clients' use. The forms could be made available at a nominal cost, and the manual could be made available for their use, either on a loan or purchase basis. Instead of charging several hundred dollars for the development of a set of forms for each individual landlord, you can then charge a simple consultation fee, plus the cost of the materials. In this manner, we can serve small landlords who cannot afford the luxury of individually drafted forms and who ordinarily will go to a stationery store and purchase a nationally published form which does not comply with Montana law. After all, it is the small landlord who is most apt to be hurt by noncompliance with the law, and most needs our services.

Conversely, if you deal with tenants primarily, the need for forms such as rental agreements, applications to rent, etc. is not as great. However, the tenants' need for knowledge of their rights and obligations (presumably set forth in your procedures manual) is just as great as the landlords'. An uninformed tenant who makes too much money to qualify for legal services, but not enough money to be able to afford an attorney to help litigate a dispute with a landlord could afford a consultation fee and the price of a procedures manual to avoid getting in difficulty with his landlord and understanding his rights and responsibilities.

By encouraging landlords to exercise self-help in seeking redress through the justice courts, an attorney can put landlord-tenant problems on a paying basis. The development of a simple set of forms will allow the lawyer to assume the role of educator and counselor in advising his clients on the use of the forms and justice courts procedures.

The justice courts in Missoula County have, for some time, had printed form complaints, answers, and summons — all on easy to use NCR paper. In addition, the justice courts help the parties fill out and file the forms. One of my landlord clients commented to me after losing a dispute with a tenant in justice court, "I may not have liked the outcome, and I may not agree with the court's decision, but I got to speak my piece and, you being there wouldn't have made any difference." I am not trying to say that a lawyer has no business representing landlords and tenants in justice of the peace courts, because there are many instances where one is not only helpful, but necessary. However, for landlords the proceedings will often be summary because the tenant does not appear, and a default judgment is entered.

## VII. CONCLUSION

For many years landlords and tenants have operated without rules or statutory guidance. It is difficult for either to adjust to the new-found sophistication of their relationship. Because of the punitive forfeiture provisions contained in the Security Deposit Act, neither landlord nor tenant can afford to enter into a rental relationship based on ignorance of the law. Since the administration of these laws is part of our chosen occupation we must assume responsibility for the education and protection of landlords and tenants as to their rights and obligations under the law.

## APPENDIX A

## —NEW LAW—

## —COMPARABLE OLD LAW—

§ 42-401. Short Title.

—NONE—

§ 42-402. Purposes and Rules of Construction.

—NONE—

§ 42-403. Supplementary Principles of Law Applicable.

—NONE—

§ 42-404. Construction Against Implicit Repeal.

—NONE—

§ 42-405. Administration of Remedies—Enforcement.

—NONE—

§ 42-406. Settlement of Disputed Claim or Right.

—NONE—

§ 42-407. Territorial Application.

—NONE—

§ 42-408. Exclusions from application of chapter.

—NONE—

§ 42-409. General definitions.

§ 42-101. Hiring defined.

§ 42-410. Obligation of good faith.

—NONE—

§ 42-411. Unconscionability.

—NONE—

§ 42-412. Notice.

§ 67-170. Terms of lease may be changed by notice.

Tenants were properly given notice under this section where landlord placed written notices in envelopes and deposited them in tenants' mail boxes at mobile home park.

*Walker v. Tschache*, 162 Mont. 213, 510 P.2d 9 (1973).

§ 42-413. Terms and conditions of rental agreement.

§ 42-111. Apportionment of hire.

No particular words or form of expression are necessary to constitute a lease. *F.H. Stoltze Land Co. v. Westberg*, 63 Mont. 38, 206 P. 407 (1922) (sawmill site).

§ 42-207. Rent—when payable.

Where tenant agreed to pay yearly rental for certain described farm lands, the rent was held payable at end of each year, in absence of contrary agreement. *Besse v. McHenry*, 89 Mont. 520, 300 P. 199 (1931).

§ 42-204. Hiring of lodgings for indefinite term (*repealed*, 1977 Mont. Laws ch. 313, § 45).

## —NEW LAW—

## —COMPARABLE OLD LAW—

Tenancy was month to month where rent on dwelling house was paid monthly in lieu of agreement by parties for lease or for purchase of property. *Mahoney v. Lester*, 118 Mont. 551, 168 P.2d 339 (1946). See also *Boucher v. St. George*, 88 Mont. 162, 293 P. 315 (1930).

"The general rule is that a tenant holding by a verbal letting for an indefinite term at a monthly rental becomes a tenant from month to month." *State v. Justice Court*, 119 Mont. 89, 93, 171 P.2d 351, 353 (1946) [tenancy of business offices].

§ 42-414. Effect of unsigned or undelivered rental agreement.

—NONE—

§ 42-415. Prohibited provisions in rental agreements.

—NONE—

§ 42-416. Separation of rents and obligations to maintain property forbidden.

—NONE—

§ 42-417. Attorney fees.

Attorney's fees were not allowed to the successful litigant in an action arising from a lease, *Kintner v. Harr*, 146 Mont. 461, 408 P.2d 487 (1965) or from a landlord's action for wrongful detainer, *Roseneau Foods, Inc. v. Coleman*, 140 Mont. 572, 374 P.2d 87 (1962). "[T]he general rule is that attorney's fees are not recoverable by a successful litigant either in law or equity except when they are expressly provided for by contract or statute. . . ." *Roseneau Foods*, 140 Mont. at 579-80, 374 P.2d at 91.

§ 42-418. Disclosure.

—NONE—

§ 42-419. Landlord to deliver possession of dwelling unit.

§ 42-103. Quiet possession.

§ 42-420. Landlord to maintain premises.

§ 42-201. Lessor to make dwelling house fit for its purpose (*repealed*, 1977 Mont. Laws ch. 313, § 45).

§ 42-105. Must repair injuries, etc.

§ 42-202. When lessee may make repairs, etc.

*Habitability.* If the landlord failed to repair after notice, under §§ 42-201 and 42-202, the tenant himself could repair, deduct the cost from the rent payments to the extent of one month's rent, or move out. The tenant could not recover

## —NEW LAW—

## —COMPARABLE OLD LAW—

damages from the landlord because he failed to put the dwelling into a condition fit for human occupancy. *Lowe v. Root*, 166 Mont. 150, 531 P.2d 674 (1975); *Noe v. Cameron*, 62 Mont. 527, 205 P. 256 (1922); *Dier v. Mueller*, 53 Mont. 288, 163 P. 466 (1917); *Bush v. Baker*, 51 Mont. 326, 152 P. 750 (1915); see *Lake v. Emigh*, 118 Mont. 325 (1946); *Landt v. Schneider*, 31 Mont. 15, 77 P. 307 (1904); but see *Quong v. McEvoy*, 70 Mont. 99, 224 P. 226 (1924).

*Safety of Common Areas.* The landlord had a duty to use reasonable care to keep common areas reasonably safe. *Olson v. Kayser*, 161 Mont. 241, 505 P.2d 394 (1973) (hole in driveway); *Lake v. Emigh*, 118 Mont. 325, 167 P.2d 575 (1946) and 121 Mont. 87, 190 P.2d 550 (1948) (common clothesline); *Callaghan v. Buttrey*, 186 F. Supp. 715 (D. Mont. 1960); *aff'd*, 300 F.2d 899 (1962) (railing near edge of roof used in common by tenants for laundry facilities and garbage collection); *contra*, *Lowe v. Root*, 166 Mont. 150, 531 P.2d 674 (1975) (Lessee had choice of making repairs to hotel to comply with city and state safety and electrical code and deducting the cost from rent payments to the extent of one month's rent, or to vacate premises); *Parrish v. Witt*, — Mont. —, 555 P.2d 741 (1976) (The court held that the landlord was not liable to injuries to third person who fell because of unsafe walkway to mobile home constructed by landlord, where tenant knew of defect).

*Safety of Dwelling Unit.* Judgment for lessee was affirmed where lessor city, after actual notice of a defect in gas heater in lessee's apartment, took no steps to ascertain what defects existed, and subsequently lessee and two others were overcome by gas fumes. *Fletcher v. City of Helena*, 63 Mont. 337, 517 P.2d 365 (1973); *contra*, *Dier v. Muller*, 53 Mont. 288, 163 P. 466 (1917). The court held that the landlord was not liable where tenant was injured in fall through weakened floor after notice to landlord to repair. The tenant's remedy was to repair himself and deduct the

## —NEW LAW—

## —COMPARABLE OLD LAW—

cost from the rent, or else move out.

*Does Not Apply to Business Property in General.* Application of § 42-201 is confined to property used for dwelling houses, and is not applicable to business property.

*Kitner v. Harr*, 146 Mont. 461, 408 P.2d 487 (1965); *Landt v. Schneider*, 31 Mont. 15, 77 P. 307 (1907). *But see, Lowe v. Root*, 166 Mont. 150, 531 P.2d 674 (1975) & *Noe v. Cameron*, 62 Mont. 527, 205 P. 256 (1922) where this provision was held to apply to hotels.

*Pre-Code.* Before the adoption of the above provisions there was no implied warranty by a landlord that the dwelling was in a habitable condition. *Blake v. Dick*, 15 Mont. 236, 38 P. 1072 (1895).

## § 42-421. Limitation of liability.

## —NONE—

## § 42-422. Tenant to maintain dwelling unit.

## § 42-104. Degree of case, etc., on part of hirer.

## § 42-105. Must repair injuries, etc.

## § 42-106. Things let for particular purpose.

*Tenant's Duty to Keep Premises Safe.* After tenants in mobile home park had knowledge of unstable walkway constructed by landlord their duty was: (1) "[T]o protect themselves and those who enter on to the premise from harm." (2) "After tenants know of the danger, they have the duty to either make the premises safe or to warn." *Parrish v. Witt*, \_\_\_ Mont. \_\_\_, 555 P.2d 741, 743 (1976). In *Lowe v. Root*, 166 Mont. 150, 531 P.2d 674 (1975) lessee had choice of making repairs to hotel to comply with city and state safety and electrical code and deducting the cost from rent payments to the extent of one month's rent, or to vacate premises.

*Habitability.* A landlord is not permitted to create a nuisance and then evict the tenant because of the existence of the nuisance. *Quong v. McEvoy*, 70 Mont. 99, 224 P. 266 (1924) (lease of cafe).

§ 42-105 also cited in *Mitchell v. Thomas*, 91 Mont. 370, 8 P.2d 639 (1932); *Noe v. Cameron*, 62 Mont. 527, 205 P. 256 (1922).

§ 42-423. Landlord authorized to adopt rules.

—NONE—

§ 42-424. Access to premises by landlord.

—NONE—

§ 42-425. Use and occupancy by tenant—extended absence.

§ 42-106. Things let for a particular purpose.

§ 42-426. Noncompliance by the landlord generally.

§ 42-108. When the hirer may terminate the hiring.

This section means that if a dilapidation occurs which will require more than the amount of a month's rent to repair, the tenant may not repair it at the expense of the landlord; but it does not mean that if dilapidations occurring in different months are repaired by the tenant after refusal of the landlord at a cost not exceeding one month's rent for each occurrence, that the tenant may not repair even though the costs of the repairs collectively exceed the amount of one month's rent. *Bush v. Baker*, 51 Mont. 326, 152 P. 750 (1915).

§ 42-427. Failure to deliver possession.

§ 42-103. Quiet possession.

§ 42-108. When hirer may terminate the hiring.

§ 42-428. Damages for minor defects.

See discussion under § 42-426.

§ 42-429. Purposeful failure to supply heat, water, hot water, or essential services.

See discussion of § 42-201 and § 42-202 under § 42-420.

§ 42-430. Landlord's noncompliance as defense to action for possession or rent.

A lessee of a hotel was not permitted to recover damages from lessor who breached lease by, *inter alia*, failing to supply heating and water, because lessee abandoned premises. "Whatever remedy he may have against the lessor, he cannot maintain an action for breach of any covenant of the lease which by his own conduct he shows he has abandoned." *Noe v. Cameron*, 62 Mont. 527, 533, 205 P. 256, 257 (1922).

§ 42-431. Fire or casualty damage.

§ 42-109. When hiring terminates.



## —NEW LAW—

§ 42-432. Tenant's remedies for landlord's unlawful ouster, exclusion, or diminution of service.

## —COMPARABLE OLD LAW—

Lease of business property was terminated where one of two adjoining, interconnected buildings was destroyed by fire. *Solich v. Hale*, 150 Mont. 385, 425 P. 883 (1967).

Eviction by landlord is a complete defense to any action for rent. *Harrison v. Fregger*, 88 Mont. 448, 294 P. 372 (1930); *Osmers v. Furey*, 32 Mont. 581, 81 P. 345 (1905).

A constructive eviction relieves the tenant of the obligation to pay rent. *Sewell v. Hukill*, 128 Mont. 242, 359 P.2d 39 (1969); *Harrison v. Fregger*, 88 Mont. 448, 294 P. 372 (1930); *Osmers v. Furey*, 32 Mont. 581, 81 P. 345 (1905).

The elements of constructive eviction are:

1. An act or omission by the landlord, or someone acting under his authority, which permanently interferes with the tenant's beneficial enjoyment or use of the premises; and

2. an abandonment of possession by the tenant within a reasonable time. *Sewell v. Hukill*, 128 Mont. 242, 359 P.2d 39 (1960); *Merritt v. Tague*, 94 Mont. 595, 23 P.2d 340 (1933).

What is a reasonable time for tenant to abandon premises is usually a question for jury. *Merritt v. Tague*, 94 Mont. 595, 23 P.2d 340 (1933).

*Grounds for a constructive eviction include:*

1. Breach of covenant for quiet enjoyment.

- a. Removal of partition between bar-room and cafe; *Cruse v. Clawson*, 137 Mont. 439, 352 P.2d 989 (1960).

- b. Landlord erected garage on property which emitted loud noises and noxious odors disturbing tenant's use of adjacent lodging house; *Blaustein v. Pincus*, 47 Mont. 202, 131 P. 1064 (1913).

- c. Landlord removed rear steps to lodging house, excavated near the structure, and destroyed chimney, generally compelling tenant's lodgers to vacate premises. *Osmers v. Furey*, 32 Mont. 581, 81 P. 345 (1905).

## —NEW LAW—

## —COMPARABLE OLD LAW—

d. Water seeping into the leased premises because of leaky plumbing and defective construction.

*York v. Steward*, 21 Mont. 515, 55 P. 29 (1898).

2. Breach of covenant to repair leaky roof (retail grocery store used as storeroom). *Sewell v. Hukill* 128 Mont. 242, 356 P.2d 39 (1960).

*Tenant may recover damages for wrongful eviction:*

§ 17-201. Damages.

Actual damages were sustained in: *Cruse v. Clawson*, 137 Mont. 439, 352 P.2d 989 (1960) (lease of cafe); *Brown v. Grenz*, 127 Mont. 49, 257 P.2d 246 (1953) (nightclub); *Welsh v. Pritchard*, 125 Mont. 517 (1952) (house); *Herzog v. Texas Co.*, 88 Mont. 580, 294 P. 962 (1931) (office rooms); *Quong v. McEvoy*, 70 Mont. 99, 224 P. 266 (1924) (cafe); *Blaustein v. Pincus*, 47 Mont. 202, 131 P. 1064 (1913) (lodging house); *Osmers v. Furey*, 32 Mont. 581, 81 P. 345 (1905) (lodging house).

*In proper cases tenant may be awarded exemplary damages:*

§ 17-208. Exemplary damages-in what cases allowed.

Punitive damages were sustained in: *Cruse v. Clawson*, 137 Mont. 439, 352 P.2d 989 (1960) (lease of cafe); *Brown v. Grenz*, 127 Mont. 49, 257 P.2d 246 (1953) (night club); *Welsh v. Pritchard*, 125 Mont. 517 (1952) (house); *see Herzog v. Texas Co.*, 88 Mont. 580, 294 P. 962 (1931) (exemplary damages properly withdrawn from jury where no showing of malice).

*In proper cases tenant may be awarded treble damages ( see infra R.C.M. 1947, § 93-9715).*

Treble damages were sustained in: *Herzog v. Texas Co.*, 88 Mont. 580, 294 P. 692 (1931) (dentist's offices).

§ 42-433. Landlord remedies for noncompliance with rental agreement or failure to pay rent.

§ 42-107. When letter may terminate the hiring.

*See § 42-105 for duty of hirer to repair*

## —NEW LAW—

## —COMPARABLE OLD LAW—

all deteriorations or injuries caused by his ordinary negligence; and § 42-106 requiring hirer to use thing for a particular purpose when it is let for a particular purpose.

*In proper cases landlord may be awarded treble damages:*

§ 93-2715. Verdict and judgment. In lawful detainer action landlord is entitled to treble damages and treble rent during the time a tenant of lands continues in possession when such tenant holds over after demand and one month's notice in writing. *State v. Justice Court*, 119 Mont. 89, 171 P.2d 351 (1946) (lease of offices); *Steinbrenner v. Love*, 113 Mont. 466, 129 P. 101 (1942) (type of premises unidentified).

§ 42-434. Failure of tenant to maintain dwelling.

§ 42-105. Must repair injuries, etc.

§ 42-106. Things let for a particular purpose.

§ 42-107. When letter may terminate the hiring.

*Mitchell v. Thomas*, 91 Mont. 370, 8 P.2d 639 (1932).

§ 42-435. Remedies for absence, nonuse, and abandonment.

—NONE—

§ 42-436. Waiver of landlord's right to terminate.

—NONE—

§ 42-437. Disposition of personal property abandoned by tenant.

—NONE—

§ 42-438. Remedy after termination.

—NONE—

§ 42-439. Recovery of possession limited.

See discussion above of constructive eviction under § 42-432.

§ 42-440. Termination of tenancy-holdover remedies.

§ 42-204. Hiring of lodgings for indefinite term.

§ 42-205. Renewal of lease by lessee's continued possession.

§ 42-206. Notice to quit.

§ 42-111. Apportionment of hire.

§ 67-710. Terms of lease may be changed by notice.

§ 42-110. When terminated by death, etc. of party.

## —NEW LAW—

## —COMPARABLE OLD LAW—

§ 42-109. When hiring terminates.

*Notice of termination of tenancy.*

§ 42-206 requires that landlord must give month-to-month tenant one month notice of landlord's intention to terminate tenancy. *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952) (dwelling house).

*Death of tenant.* The relationship of landlord and tenant was terminated by death of tenant. *Paddock v. Clay*, 138 Mont. 541, 357 P.2d 541 (1960) (cabin).

*Notice of change of terms of lease.*

Tenants were properly given notice under § 67-710 where landlord placed written notices in envelopes and deposited them in tenants' mail boxes 15 days prior to effective date of rent increase. *Walker v. Tschache*, 162 Mont. 213, 510 P.2d 9 (1973). See *State v. Justice Court*, 119 Mont. 89, 171 P.2d 351 (1946) (business offices).

*Holdover tenant assents to changed terms.* Upon being served with notice in accordance with § 67-710 the tenant may deliver up the premises to the landlord at the expiration of the month or holdover and continue in possession in which event he is deemed to have assented to the changed terms, rents and conditions specified in the notice. *State v. Justice Court*, 119 Mont. 89, 171 P.2d 351 (1946) (business offices).

*Holdover tenant must comply with changed terms or surrender premises.*

Where tenant refused to pay the rent or surrender possession within three days after statutory service of notice he became guilty of unlawful detainer. *State v. Justice Court*, 119 Mont. 89, 171 P.2d 351 (1946) (business offices). Unlawful detainer cannot be maintained against tenant from month to month unless both thirty and three days notices are properly given. *Boucher v. St. George*, 88 Mont. 162, 293 P. 315 (1930) (lodging house).

*Landlord renews term by acceptance of rent.* Where landlord accepts rent from tenant after end of term the parties are

## —NEW LAW—

## —COMPARABLE OLD LAW—

§ 42-441. Landlord and tenant remedies for refusal or abuse of access.

§ 42-442. Retaliatory conduct prohibited.

presumed to renew the hiring on the same terms and for the same time not exceeding one year. *Roseneau Foods, Inc. v. Coleman*, 140 Mont. 572, 374 P.2d 87 (1962) (meat processing establishment); *Lepper v. Home Ranch Co.*, 90 Mont. 558, 4 P.2d 722 (1931) (land); *F. H. Stoltze Land Co. v. Westberg*, 63 Mont. 38, 206 P. 407 (1922) (sawmill site).

The general rule is that a tenant holding by a verbal letting for an indefinite term at a monthly rental is a tenant from month to month. *State v. Justice Court*, 119 Mont. 89, 171 P.2d 351 (1946) (business offices); *Mahoney v. Lester*, 118 Mont. 551, 168 P.2d 339 (1946) (dwelling house).

Exemplary damages were sustained against landlord and in favor of tenant of nightclub and living quarters where landlord took law into his own hands and attempted to evict tenant for unpaid rent by, *inter alia*, taking slot machines, dishes, deep freeze, juke box, and other furnishings. He admitted throwing things out, padlocking the front door, and painting the front entrance to the club at ten o'clock at night with the place in operation. He parked his car against the front door so that it was difficult for people to get in and out. He also set off stink bombs and created offensive odors on the premises because he was "fumigating to get the rats out of there . . . and if she hadn't been in default of her rent" he would not have padlocked the place. *Brown v. Grenz*, 127 Mont. 49, 53-54, 257 P.2d 246, 248 (1953).

Exemplary damages were sustained in favor of tenant of dwelling house where landlord, after giving tenant insufficient notice to vacate, moved into house with invalid wife for 17 days. *Welsh v. Pritchard*, 125 Mont. 517, 241 P.2d 816 (1952).

Fact that lessor, who contacted county attorney and requested him to bring an action to condemn leasehold (hotel), was the city attorney was immaterial on the question of whether the lessor had breached covenant of quiet enjoyment, there being no privity between the city and county attorneys. *Lowe v. Root*, 166 Mont. 531 P.2d 674 (1975).

## APPENDIX B

Note: The forms in this Appendix are provided courtesy of the Western Montana Landlord's Association.

## APPLICATION TO RENT

Please Print \_\_\_\_\_ Property Located \_\_\_\_\_

NAME \_\_\_\_\_ AGE \_\_\_\_\_ PHONE \_\_\_\_\_  
 (Last) (First) (Middle)

Present Home Address \_\_\_\_\_  
 (House No. Not P.O. Box)

Home Phone \_\_\_\_\_ Business Phone \_\_\_\_\_ SS # \_\_\_\_\_

Occupants other than applicants: Names & ages \_\_\_\_\_

Year & Make of autos \_\_\_\_\_ License numbers \_\_\_\_\_

Name of Closest Relative & Relationship \_\_\_\_\_

Address & Phone \_\_\_\_\_

REFERENCES: CREDIT & REFERENCES WILL BE CHECKED BY  
 OWNER/AGENT

Previous Landlord \_\_\_\_\_ Address \_\_\_\_\_ Phone # \_\_\_\_\_

Previous Landlord \_\_\_\_\_ Address \_\_\_\_\_ Phone # \_\_\_\_\_

Have you ever been evicted from any tenancy? \_\_\_\_\_ Have you ever willfully  
 and intentionally refused to pay any rent when due? \_\_\_\_\_

Present Employer \_\_\_\_\_ Address \_\_\_\_\_

Phone \_\_\_\_\_ Position \_\_\_\_\_ How long \_\_\_\_\_

Previous Employer \_\_\_\_\_ Address \_\_\_\_\_

Phone \_\_\_\_\_ Position \_\_\_\_\_ How long \_\_\_\_\_

## INCOME &amp; ASSETS

What pmt is for Mo. Pmt.

Monthly Income \$ \_\_\_\_\_

Checking Acct. (Bank) \$ \_\_\_\_\_

Savings Acct. (Bank) \$ \_\_\_\_\_

List other Assets: \$ \_\_\_\_\_

\$ \_\_\_\_\_

\$ \_\_\_\_\_

DATED \_\_\_\_\_

To Be Completed by  
 Landlord

I DECLARE THE FOREGOING TO BE TRUE  
 UNDER PENALTY OF PERJURY.

I agree that Landlord may terminate any agree-  
 ment entered into in reliance on any misstate-  
 ment made above.

\$ \_\_\_\_\_ Rent amount

\$ \_\_\_\_\_ Security Deposit

\$ \_\_\_\_\_ Credit Report

\$ \_\_\_\_\_ Other \_\_\_\_\_

\$ \_\_\_\_\_ Total

\$ \_\_\_\_\_ Paid with Appli-  
 cation

\$ \_\_\_\_\_ Balance on or  
 before possission

Montana Law Review, Vol. 39 [1978], Iss. 2, Art. 1  
**STANDARD MONTH TO MONTH RENTAL AGREEMENT**

**WESTERN MONTANA LANDLORD ASSOCIATION, INC.**  
 (PREPARED IN ACCORDANCE WITH THE STATE OF MONTANA STATUTES)

Space, House or Apartment No. \_\_\_\_\_

LANDLORD \_\_\_\_\_

TENANT \_\_\_\_\_

PREMISES \_\_\_\_\_

A. TERM	_____	G. Minimum tenancy	_____
B. Beginning date	_____	H. Utilities provided	_____
C. Rent per month	\$ _____	I. Parking charge	\$ _____
D. Date rent is due	_____	J. Key deposit	\$ _____
E. Late rent charge	\$ _____	K. Children's names	_____
F. Security deposit	\$ _____		

TENANT AGREES THAT each of the terms of this Agreement and of Landlord's Rules and Regulations, if any, constitutes an independent condition on Tenant's right to possession of the premises. Any failure by Tenant to comply with one or more of such terms shall constitute a default hereunder and landlord may terminate Tenant's right to possession of the premises and/or forfeit this Agreement, in any manner provided by law.

**FURTHER, TENANT AGREES THAT:**

1. Term/Beginning date: The term of this tenancy, for the premises described above, and the beginning date thereof, are designated in Section A and B.

2. Rent/Late Rent Charge: Tenant shall pay to Landlord the rent due, in advance, for each rental month, in the amount and on the date designated in Sections C and D. In the event that the beginning date of this Agreement is a date other than the first day of the month, the rent shall be pro-rated to the first day of the succeeding month. Should tenant fail to pay an installment of rent, or any portion thereof, when due, Tenant shall pay the amount designated in Section E to Landlord, as a late rent charge. The charge shall be deemed additional rent for the rental month and collected as such.

3. Security Deposit: Tenant acknowledges receipt of a copy of the written statement of the condition of the premises attached hereto as Exhibit "A." Tenant shall deposit with Landlord the amount of Security deposit to secure Tenant's compliance with all of the conditions of the agreement and Landlord's rules and regulations, if any. The deposit shall not be deemed rent for any rental month unless Landlord so elects, nor shall it constitute a measure of Landlord's damage in the event of default by Tenant. Tenant shall not be entitled to any interest on the deposit, nor on any deposit made under this Agreement. In the event of a default by Tenant under the conditions of this Agreement, or Landlord's rules and regulations, if any, Landlord may deduct that amount necessary from the deposit, to compensate Landlord for all tangible loss, injury or deterioration of the leasehold premises caused by the willful or accidental acts of tenant, plus all unpaid rent and cleaning expense. Forty-eight (48) hours before termination of the tenancy, Landlord shall give Tenant written notice of cleaning to be done. Failure to accomplish said cleaning entitles Landlord to deduct the cost of cleaning from the deposit. Within thirty (30) days after termination of the tenancy, Landlord agrees to give Tenant a written list of any damage to the leasehold premises and cleaning expenses and return the difference, if any, between the security deposit and any deduction for damage, unpaid rent and the cleaning expense. Said list will be sent to the new address of the Tenant, which will be provided by Tenant to Landlord prior to the time of the termination. If the deposit is insufficient for such purposes to satisfy the tangible loss, injury or destruction of the leasehold premises, or to pay the unpaid rent or cleaning expense, Landlord may proceed with collection of the deficiency from Tenant. Acceptance of a refund of all or a portion of the deposit by Tenant shall constitute a full and final release of Landlord from any claims of Tenant of any nature whatsoever.

4. Minimum Tenancy: Unless a different period is designated in Section G, Tenant shall be liable to Landlord for rent for the period set forth in Section A following the beginning date hereof. If tenancy is terminated during said period by Tenant, (unless due to Landlord's default) or by Landlord due to Tenant's default, Landlord shall be entitled to deduct from the Security deposit an amount to pay for all unpaid rent through the period.

5. Abandoned Personal Property: Upon the termination of this tenancy, if Tenant fails to remove his personal property from the premises, Landlord agrees to give Tenant Fifteen (15) days notice, at Tenant's last known address, of the day he intends to dispose of said property either by sale or destruction as provided in R.C.M., 1947, §42-437 if not removed by Tenant.

6. Utilities: Tenant shall pay for all utilities and/or services supplied to the premises, except those designated in Section H. In the event of any default in the payment of rent by Tenant, if feasible, Landlord may instruct any utility company, henceforth, to charge any utilities, so designated, to Tenant and to place the same in Tenant's name. Tenant shall pay all such utilities thereafter.

7. Parking Charge: In the event that Tenant is assigned a parking space in the parking area of the premises, Tenant shall use such space exclusively for parking, not for the washing or repair of a motor vehicle, and Tenant shall not park, nor allow any other person with his permission, to park in any other space, in the parking area. In addition, Tenant shall pay that amount designated in Section I as a monthly parking charge. Such charge shall be deemed additional rent for each rental month during which Tenant has the right to use such parking space.

8. Key Deposit: Tenant shall pay to Landlord, a key deposit, in the amount designated in Section J, refundable upon Tenant's return of the keys to Landlord.

9. Named Tenant: The premises shall not be occupied by any adult person other than the person or persons designated as "Tenant." No children shall occupy the premises unless named in Section K.

10. Pets/Water Bed: Tenant shall not keep or maintain any pets or water bed upon the premises without written permission.
11. Tenant's Obligations: Tenant acknowledges that he has read the following section of the Montana law and agrees to comply therewith:
- "Revised Codes of Montana 1947 § 42-422: Tenant to maintain dwelling unit. (1) A tenant shall:
- (a) comply with all obligations primarily imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety;
  - (b) keep that part of the premises that he occupies and uses as reasonably clean and safe as the condition of the premises permit;
  - (c) dispose from his dwelling unit all ashes, garbage, rubbish and other waste in a clean and safe manner;
  - (d) keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits;
  - (e) use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appliances, including elevators, in the premises;
  - (f) conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises; and
  - (g) use the parts of the premises including the living room, bedroom, kitchen, bathroom and dining room in a reasonable manner considering the purposes for which they were designed and intended."

Tenant shall be liable for the expense of any repair caused by Tenant's failure to comply with these conditions. At Landlord's election, any such expense shall be deemed additional rent for the rental month in which incurred and collected as such, or Landlord may deduct such expense from Tenant's Security Deposit. Tenant shall not alter or add to the premises, nor paint or wallpaper any portion thereof without Landlord's approval.

Upon termination of the tenancy, Tenant shall return the premises to Landlord in as good order, condition and repair as when received, ordinary wear and tear excepted, and free of all of Tenant's personal property, trash and debris. Tenant acknowledges that no representations as to the condition or repair of the premises, nor as to Landlord's intentions with respect to any improvement, alteration, decoration or repair of the premises, nor as to Landlord's intentions with respect to any improvement, alteration, decoration or repair of the premises, have been made to Tenant, unless noted on Landlord's copy of this Agreement.

12. Inspection/Entry: Except in emergencies, Landlord shall give Tenant a Twenty-four (24) hour notice of his intent to enter the premise at a reasonable time, to inspect or make repairs, alterations, supply services or exhibit the premises to potential tenants, purchasers, mortgagees or workmen. Tenant shall not unreasonably deny Landlord or his agent access to the premises.

13. Rules and Regulations: Tenant, and all persons at the premises with Tenant's permission, shall comply with all rules and regulations made by Landlord and served upon Tenant thirty (30) days prior to effective date. Any such rules and regulations shall be deemed incorporated herein by reference.

14. Insurance: Landlord shall not be liable to Tenant, nor to insure Tenant, for any personal injury or property damage caused by the act or omission of any other tenant or third party, or by any criminal act or activity, war, riot, insurrection, fire or act of God.

15. Compliance with Laws: Tenant shall not violate any law, nor commit or permit any waste or nuisance in or about the premises, nor in any way annoy any other tenants of the premises nor do or keep anything in or about the premises that will obstruct the public spaces available to other tenants.

16. Notice of Termination/Change of Terms: The Tenancy may be terminated upon the expiration of Thirty (30) days following the service by one party on the other of a written notice setting forth the intention of such party to terminate the tenancy. The tenancy may be terminated by Landlord upon Fourteen (14) days notice if Tenants are damaging or destroying any portion of the leased premises or violating the Rental Agreement. Any condition of the tenancy shall be deemed changed upon the expiration of Thirty (30) days, following the service by Landlord or Tenant of a written notice setting forth the change in such condition, including but not limited to the right to increase the monthly rental charge. In case of Rent Freeze, and utilities and taxes are raised on Landlord, Tenant shall pay full percentage of increase to Landlord, or on other terms, according to statute.

17. Absences: Tenant shall give notice to Landlord of any anticipated absence of greater than Seven (7) days. Absence of greater than Seven (7) days without notice shall be considered abandonment of the premises and Landlord may re-enter and rent the premises.

18. Designation of Parties: "Landlord" includes Owner and Manager, Agent or Employee acting as managerial personnel and "Tenant" includes all persons designated as such, in the Agreement, without respect to number or gender.

19. Entire Agreement: The foregoing constitutes the entire agreement between the parties and supersedes any oral or written representation or agreements that may have been made by either party. Further, Tenant represents that he has relied solely on his own judgment, experience and expertise in entering into this agreement with Landlord.

This Agreement shall be deemed to have been signed on the Beginning Date designated in Section A.

20. Remedies/Severability: The remedies available to the Landlord herein shall not be deemed exclusive but in addition to the remedies provided in R.C.M. 1947, § 42-201 to 42-442. If a part of this rental agreement is invalid, all valid parts that are severable from the invalid part shall remain in effect. If a part of this rental agreement is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Special provisions:

LANDLORD/AGENT:

TENANT:

\_\_\_\_\_

\_\_\_\_\_



## SCHEDULE "A"

## PROPERTY CONDITION REPORT

DATED \_\_\_\_\_

Address \_\_\_\_\_

Present Condition:

1) excellent 2) good 3) fair 4) poor

(Has) (Has never) been let

Circle One: Possessing Vacating

Resident Signature \_\_\_\_\_

Resident Signature \_\_\_\_\_

	G — Good F — Fair P — Poor	GEN. COND.			NEEDS CLEAN	NEEDS PAINT	NEEDS REPAIR	NEEDS REPLACED	GENERAL COMMENTS	
		G	F	P						
LIVING ROOM	Carpet									
	Floors									
	Walls									
	Ceiling									
	Woodwork									
	Windows									
	Window Rods									
	Screens									
	Entrance Door									
	Storm Door									
	Closet									
	Closet Doors									
	Sl. Glass Door									
	Sl. Screen Door									
	Drapes									
	Fireplace									
DINING ROOM	Light Bulbs									
	Light Fixtures									
	Floor									
	Walls									
	Ceiling									
	Woodwork									
	Windows									
	Window Rods									
	Screens									
	Drapes									
	Light Bulbs									
	Light Fixtures									
	MASTER BEDROOM	Carpet								
		Floors								
		Walls								
		Woodwork								
Ceiling										
Windows										
Window Rods										
Window Screens										
Bedroom Door										
Closet										
Closet Doors										
Drapes										
Light Bulbs										
Light Fixtures										
BEDROOM NO. 2		Carpet								
		Floors								
	Walls									
	Woodwork									
	Ceiling									
	Windows									
	Window Rods									
	Window Screens									
	Bedroom Door									
	Closet									
	Closet Doors									
	Drapes									
	Light Bulbs									
	Light Fixtures									
	BEDROOM NO. 3	Carpet								
		Floors								
Walls										
Woodwork										
Ceiling										
Windows										
Window Rods										
Window Screens										
Bedroom Door										
Closet										
Closet Doors										
Drapes										
Light Bulbs										
Light Fixtures										

	G — Good F — Fair P — Poor	GEN. COND.			NEEDS CLEAN	NEEDS PAINT	NEEDS REPAIR	NEEDS REPLACED	GENERAL COMMENTS
		G	F	P					
BATHROOM	Vanity								
	Medicine Cabinet								
	Mirrors								
	Ceramic Tile								
	Sink								
	Faucet								
	Tub								
	Shower								
	Lavatory								
	Walls								
	Floor								
	Ceiling								
	Light Fixtures								
	Windows								
	Screen								
	Closet								
	Woodwork								
	Towel Rack								
	Door								
KITCHEN	Stove								
	Oven								
	Refrigerator								
	Sink								
	Faucet								
	Drain								
	Dishwasher								
	Floor								
	Walls								
	Ceiling								
	Woodwork								
	Kitchen Door								
	Storm Door								
	Inside Cupboards								
	Cupboard Doors								
	Counter Top								
	Windows								
	Screens								
	Window Rods								
	Light Bulbs								
	Light Fixtures								
REC. ROOM	Floor								
	Carpet								
	Walls								
	Ceiling								
	Fireplace								
	Windows								
	Screens								
	Drapes								
	Window Rods								
	Closets								
	Closet Doors								
	Woodwork								
	Light Fixtures								
STAIRCASE	Carpet								
	Stairs								
	Walls								
	Banister								
	Ceiling								
	Light Fixtures								
UTILITY ROOM	Washer								
	Dryer								
	Floor								
	Walls								
	Door								
	Ceiling								
	Light Fixtures								
	Tubs								
GARAGE	Faucets								
	Floor								
	Windows								
	Main Door								
	Side Door								
	Light Fixtures								

## NOTICE OF CLEANING REQUIRED FOR RETURN OF SECURITY DEPOSIT

TO: \_\_\_\_\_ Tenant \_\_\_\_\_ FROM: \_\_\_\_\_ Landlord \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Re: Rental of Premises at:\_\_\_\_\_

**STOP HERE — SEPARATE PARTS 1 & 2 FROM 3 & 4 — CONTINUE FILLING OUT BOTH FORMS.**

## STATEMENT OF INTENTION TO RENT

I (we) the undersigned, desiring to rent the premises located at \_\_\_\_\_,  
Missoula, MT 59801, do hereby deposit the sum of \_\_\_\_\_ (\$ \_\_\_\_\_)  
with \_\_\_\_\_, hereinafter called agents as assurance of my (our)  
taking residence at, and fulfilling the following obligations as tenants of, said property on the agreed date of  
occupancy \_\_\_\_\_, 19\_\_\_\_.

1. To correct or acknowledge and sign statement of condition of premises.
2. To sign the rental agreement that I have this day completed and initialed:
3. To pay rent one month in advance or until the first day of the next month at agent's discretion.

Should I (we) not take up residence at named premises, I (we) agree to forfeit all or part of this deposit at agent's discretion.

Agent \_\_\_\_\_ Tenant \_\_\_\_\_  
 Date \_\_\_\_\_

## LANDLORD-TENANT LAW

Minto: Residential Landlord-Tenant Law In Montana: A Landlord Perspective

## NOTICE OF CLEANING REQUIRED FOR RETURN OF SECURITY DEPOSIT

TO: \_\_\_\_\_ FROM: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Re: Rental of Premises at: \_\_\_\_\_

**You are hereby notified that the following items of cleaning had not been accomplished by you at the time of our inspection and must be made by you or at your expense to avoid deductions for them from your Security Deposit:**

[illegible]

The premises must be returned to the condition they were in at the time of renting. Under Montana law (R.C.M. 1947, § 42-303) you have FORTY-EIGHT (48) HOURS in which to complete this cleaning or Landlord may deduct the cost of such cleaning from your Security Deposit.

DATED: \_\_\_\_\_

Landlord/Agent

**LIST OF DAMAGE**

TO: \_\_\_\_\_, Tenant

(Address)

FROM: \_\_\_\_\_, Landlord/Agent

(Address)

RE: \_\_\_\_\_  
(Leasehold Premises)

The following verified written list of damages to the above described leasehold premises, which is the responsibility of the above named tenant, is provided pursuant to the terms of R.C.M. 1947, §42-304.

ITEM OF DAMAGE	AMOUNT
1. _____	\$ _____
2. _____	_____
3. _____	_____
4. _____	_____
5. _____	_____
6. _____	_____
7. _____	_____
8. _____	_____
9. _____	_____
10. _____	_____
<b>TOTAL</b>	

A sum equal to the damage above listed and a sum equal to the unpaid rent, if any, has been deducted from the security deposit.

Copy received on the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_

Landlord/Agent

Incoming Tenant